Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHARLES L. GRIMES,

Petitioner,

v.

VITALINK COMMUNICATIONS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

When property is taken under state authority, the "just compensation" to the owner mandated by the Fifth and Fourteenth Amendments includes both (a) "taking compensation," *i.e.*, the value of the property of which the owner was deprived at the time of taking, and (b) "post-taking compensation," the value of the use of the property of which the owner was deprived from the time of taking to the entry of judgment. *E.g.*, *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923).

1. Is compensation "just" that calculates post-taking compensation by using an arbitrary "interest rate" wholly unrelated to the actual earning power of which the owner was deprived during the post-taking period?

2. Specifically, where the taken property is corporate stock, is compensation "just", which is ascertained by employing one number for the earning power of the stock in calculating the first element of compensation, to the *detriment* of the stockholder, and refusing to employ the same number for the earning power in calculating the second element when doing so would *help* the stockholder?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case. Petitioner is an individual.

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IN THE

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CHARLES L. GRIMES,

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On Petition for a Writ of Certiorari to the Supreme Court of Delaware

---

PETITION FOR A WRIT OF CERTIORARI

Charles L. Grimes respectfully petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of Delaware in this proceeding.

I. CITATIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

This case in the lower courts is reported at *Grimes* v. *Vitalink Communications Corp.*, C.A. No. 123334, 1997 WL 538676 (Del. Ch. Aug. 26, 1997), and *Grimes* v. *Vitalink Communications Corp.*, 708 A.2d 630 (Del. 1998). The opinion of the Supreme Court of Delaware was issued on April 1, 1998. This Court has jurisdiction under 28 U.S.C. § 1257.

The case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States and the just compensation clause of the Fifth Amendment to the Constitution of the United States, together with the appraisal provisions of the Delaware Corporation

Law, 8 *Del. Code* § 262; all of which are printed in the Appendix ("App.").

II. STATEMENT OF THE CASE

Petitioner Grimes held 200,000 shares in respondent Vitalink Communications Corporation. More than 90% of Vitalink's stock was acquired by a subsidiary of another company pursuant to a tender offer (which Grimes did not accept). Delaware law allows a 90% stockholder to "squeeze out" the remaining stockholders by forcing a merger upon them, but permits dissenting stockholders to obtain the fair value of their stock through an appraisal action brought against the corporation in the Delaware Court of Chancery. 8 *Del. Code* §§ 251, 262 (App. 42a – App. 62a). Exercising the authority of a 90% owner, the acquiring company forced a merger of itself into Vitalink, effective July 1, 1991, thus converting Vitalink into a wholly-owned subsidiary of its parent. Grimes dissented from the merger and his strenuous objections to settlement of a fraud, non-opt out class action were disregarded. He accordingly brought an appraisal action.

The Court of Chancery awarded Grimes a sum for the value of his stock at the time of taking that was arrived at, so far as here material, by calculating the present value of Vitalink's forecasted cash flow over the next five years, employing as the discount rate for the present value calculation a figure reflecting the earning power that had been accepted by the boards of both Vitalink and the acquiring company, and used by both of their investment bankers. This figure was relatively high (20.83%); since the higher the discount rate the lower the present value, use of such a figure

worked to the advantage of the company by reducing the compensation payable to Grimes.[1]

However, in calculating compensation to Grimes for the post-taking period the Court of Chancery refused to use this figure for the earning power of which Grimes was deprived during that period, employing instead a much lower arbitrary rate based on the legal rate of interest. App. 22a - App. 38a. It gave no reason for assuming that the earning power of which Grimes was deprived should have fallen off by some two-thirds immediately after the taking, nor for applying the 20.83% rate when doing so benefitted the company yet refusing to apply it when doing so would benefit the stockholder. (It also refused to consider evidence of Grimes's own individual track record with comparable investments, which was a much higher number. App. 27a - App. 29a).

Grimes appealed to the Supreme Court of Delaware. It affirmed in a two sentence order. App. 1a - App. 2a. Hence this petition.

III. REASONS FOR ALLOWANCE OF THE WRIT

The questions presented are important ones that warrant consideration by this Court. They deal with the ascertainment of "just compensation" for a taking of property pursuant to state law, under the Fourteenth Amendment, which imposes upon the states the same requirements as the Fifth Amendment

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[1] The present value of a stream of future payments for a given time period is that sum which, invested at a given interest rate, would produce the same amount at the end of the time period as the cumulative value of that stream of payments, earning interest at that given rate. The higher the assumed interest rate (called the "discount rate"), the lower the present value. (In lay terms, the greater your earning power, the less you need at the outset to reach the same goal.) Thus, the present value of $1000 a year for five years at 10% is $3790.79, while at 20% it is only $2990.61.

imposes on the United States. *Olson* v. *United States*, 292 U.S. 246, 254 (1934). In particular, they deal with the ascertainment of just compensation in a specific type of taking: the "squeezeout" of dissenting stockholders in a corporate merger. This is a particularly timely and important question as the economy moves into a new wave of "mega-mergers."

A. This Court Should Make It Clear That in Ascertaining "Just Compensation" for the Taking of Property, a Court Cannot Refuse to Consider the Earning Power Which the Property Would Have Had in the Owner's Hands After the Taking and Before Payment of Compensation.

Since *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299 (1923), it has been established that "just compensation" for taken property has two components. The first component is compensation for the property itself, *i.e.*, its ascertained value at the time of taking (for convenience we refer to this herein as the "taking value"). The other component is the value which the owner was deprived of between the time of taking and the payment of compensation. "The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken," *Phelps* v. *United States*, 274 U.S. 341, 344 (1927); only inclusion of such a component can "ensure that [the owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the [taking]." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984).

This second component–for convenience we will call it herein the "post-taking deprivation value"–is commonly referred to as "interest" and measured by applying a

percentage rate to the taking value. But it is *not true interest*, *i.e.*, payment for the use of money. Rather, it is compensation for what the owner would have earned on the taken property during the post-taking period.[2]

The first component, the *taking value*, is normally measured by reference to a hypothetical construct, "fair market value," *i.e.*, the cash bargain a hypothetical willing seller of the taken property would strike with a hypothetical willing buyer. *E.g.*, *United States* v. *Miller*, 317 U.S. 369, 373-75 (1943). The second component, the *post-taking deprivation value*, by contrast, is specific to the property and the owner. In order to put the owner into "as good position pecuniarily as he would have been if his property had not been taken," *Seaboard*, 261 U.S. at 304, it reflects the actual money's worth[3] it would have meant to the owner–not some postulated hypothetical owner, but the particular real individual in question–to have had the property in hand during the post-taking period. It reflects the earning power that the owner was deprived of during the limited period from the time of taking to the time of payment. The underlying principle is identical to that set forth in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), that compensation for such a deprivation for a limited period is to be determined with reference to the deprivation suffered by the specific

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[2] Accordingly, when the United States takes property it must pay post-taking compensation as part of "just compensation" notwithstanding the general rule (now codified to 28 U.S.C. § 2516(a)) that interest on a claim against the United States is not allowed absent agreement or special statute. *Seaboard*, *supra*. "It is not a claim for interest within the purpose or intention of [28 U.S.C. § 2516(a)]." *Phelps* v. *United States*, 274 U.S. at 344.

[3] Not, of course, mere sentimental or idiosyncratic "value to the owner," but tangible or "transferable" value.

owner. There, this Court held that just compensation for a temporary taking of business premises, thereby shutting down the business, must take into account not only the rental value of the property but the going-concern value of the business.

Beyond the implications of *Kimball Laundry* when taken together with the principle of *Seaboard*, this Court has never given guidance as to the ascertainment of post-taking deprivation value, and in particular as to the role to be played by the specifics of the taken property and the owner's own experience. Some courts have played fast and loose as a result. Thus, disregarding the basis for compensation expressed by this Court, the Court of Claims and its successors have generally employed a uniform fixed "interest" rate for specific periods for all owners without regard for individual circumstances, expressing "a strong judicial policy in favor of uniform rates to apply to all those entitled to" post-taking compensation. *E.g.*, *Hughes Aircraft Co.* v. *United States*, 31 Fed. Cl. 481, 492 (1994), *aff'd*, 86 F.3d 1566 (Fed. Cir. 1996), and cases cited. The theory of this approach is that to do otherwise would discriminate against some owner; but in fact the approach obviously discriminates against owners who would have made a substantial return on their investments and confers a windfall on those who would

not. And it is manifestly contrary to the basic principles articulated by this Court.[4]

Guidance from this Court on this subject is thus clearly needed.

B. In Particular, This Court Should Make It Clear That in Ascertaining "Just Compensation" for the Taking of Stock in a Forced Merger "Squeezeout," a Court Cannot Refuse to Consider the Earnings Rate at Which the Stock Itself Was Valued

A specific element of this general subject of valuing post-taking deprivation on which the Court's guidance is needed and timely is its application to "squeezeouts" of minority stockholders, as in the case at bar.

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[4] In many taking cases–reflecting no doubt the fact that the majority of such cases deal with fairly routine real property condemnations–the owners appear not to have offered evidence of specific earning power and to have been content with the legal interest rate as the measure of post-taking compensation. *E.g.*, *Seaboard*, *supra*; *Phelps*, *supra*. But it is clear that such an arbitrary statutory rate is not to be forced on an unwilling owner, and that, constitutionally, at the owner's instance post-taking compensation must be tailored to fit the deprivation suffered by the particular owner in the particular case. Thus, in the Declaration of Taking Act of 1931, 46 Stat. 1421, 40 U.S.C. § 258a, Congress decreed a flat 6% rate for post-taking "interest." The courts rejected this effort, interpreting the statute as setting a floor but not a ceiling, *e.g.*, *United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976); *United States* v. *329.73 Acres of Land*, 704 F.2d 800 (5th Cir. 1983); and rejected a 1986 effort by Congress to replace the 6% rate with one based on 52-week Treasury bills. *United States* v. *50.50 Acres of Land*, 931 F.2d 1349 (9th Cir. 1991). (We do not necessarily endorse the method of ascertaining compensation, which the courts there applied in lieu of the statutory rates, however.)

The rights of stockholders *inter se* are for many purposes deemed to arise from a contract among them adopting the provisions of the corporate documents and the general corporation law of the state of incorporation. But the widely disseminated investment-backed expectations of stockholders are not deemed to be subject to arbitrary forfeiture no matter what the particular provisions of a general corporation law may be, so that a "squeezeout" of a minority stockholder is a compensable "taking" of his shares, which is subject to the requirements of due process. *Beerly* v. *Department of the Treasury*, 768 F.2d 942, 948 (7th Cir.), *cert. denied*, 475 U.S. 1010 (1985); *cf. Offield* v. *New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906). The "squeezeout" provisions of state corporation laws[5] are thus subject to the overriding constitutional principles of just compensation; and in particular to the requirement of compensation for post-taking deprivation.

Delaware makes provision of post-taking "interest" wholly discretionary with the court in an appraisal action. *Alabama By-Products Corp.* v. *Cede & Co.*, 657 A.2d 254, 267 (Del. 1995). That is not enough; as we have seen, due process *mandates* the award of such "interest." And, to repeat, the rate of such "interest" must be sufficient to "put [the squeezed-out stockholder] in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard*, 261 U.S. at 304. In light of the principles of *Seaboard* and *Kimball Laundry*, that position must be ascertained on the basis of the actual earning power of the property in the stockholder's hands on the facts of the particular case. It is manifestly irrational not merely to reject evidence of what the squeezed-out stockholder himself earned

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[5] And federal ones, too. *Beerly* involved a national bank and the "squeezeout" provisions of the National Bank Act.

on similar investments, but to refuse to apply the very earning power that the stock was found to have in the very same case.[6]

There are other factors in the evaluating of stock taken in a "squeezeout" that merit this Court's consideration. One in particular is the posture of the parties. While the distinction between taking for a "public use," which is permissible, and a "private use," which is not, has been drastically attenuated in recent years, *e.g.*, *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 239-44 (1984), surely a corporate "squeezeout" such as the present one is about as close to the edge as possible. (Here there is not even the public interest in a public utility that justified the taking in *Offield*, *supra*.) This implies a balancing of interests different from that applicable when the sovereign takes property for the public. In a compulsory purchase by the sovereign, "[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual," *Bauman* v. *Ross*, 167 U.S. 548, 570 (1897); "'just' both to [the] owner whose property is taken and to the public that must pay the bill." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). Such solicitude for the interests of the taker is inappropriate where, as here, the taker is not the sovereign

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[6] To carry forward the example in footnote 1, suppose the forecasted cash flow per share for the next five years was $1000 a year, and the earning power of the stock was reckoned at 20% a year. A share would then be valued at $2990.61. Suppose further that two years elapsed between the time of taking and the payment of compensation. During that period, the stockholder has been deprived of at least what the earning power of the stock (20% per year compounded) would have produced when applied to $2990.61, or $1315.87. If for this compensation he were nevertheless arbitrarily limited to a rate of, say, 6%, he would receive only $369.64 in compensation for his lost $1315.87. That is essentially what the courts below did here.

for the benefit of all, with the cost of taking falling on the public fisc, but a corporate majority exercising its muscle to cram a merger down the throats of a dissenting minority. In particular, the private, one-on-one posture of a "squeezeout" underscores the impropriety of determining post-taking deprivation value on the basis of some generalized formula applicable to all owners of all kinds of property.

And while a taking authorized by law is not a tort, in such circumstances it is appropriate to look to such concepts from tort law as that the defendant takes the plaintiff as he finds him, and to estop the majority from denying to the "squeezed-out" stockholder the benefit of the same earning rate as it applied in valuing the stock.

Finally, we repeat the salient feature of this particular case. The Constitution mandates *just* compensation. How can compensation be "just," which applies one level of earning power to the first element of compensation, to the *detriment* of the stockholder, and refuses to apply the same level of earning power to the second element when that would *help* the stockholder?

CONCLUSION

The questions involved are important, warrant this Court's attention, and are very timely in view of the rising wave of corporate mergers. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF DELAWARE

CHARLES L. GRIMES and GADFLY FOUNDATION,
Petitioners Below,
Appellants,
v.
VITALINK COMMUNICATIONS CORPORATION,
Respondent Below,
Appellee.

No. 425, 1997

April 1, 1998, Decided

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: Court Below: Court of Chancery of the State of Delaware in and for New Castle County. C.A. No. 12334.

DISPOSITION: AFFIRMED.

JUDGES: Before HOLLAND, HARTNETT and BERGER, Justices.

OPINION BY: Carolyn Berger

OPINION: ORDER

This 1st day of April, 1998, the Court, having considered this matter on the briefs and arguments of the parties, and having concluded that the same should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its well-reasoned Opinion dated August 26, 1997,

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Court of Chancery be, and the same hereby is

AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Carolyn Berger
Justice

APPENDIX B

Court of Chancery of Delaware

No. 12334

Charles L. GRIMES,

Petitioner,

v.

VITALINK COMMUNICATIONS CORPORATION,

Respondent.

Aug. 28, 1997

David A. Jenkins, of Smith, Katzenstein & Furlow, Wilmington, for Petitioner.

Richard D. Heins, Esquire, of Ashby & Geddes, Wilmington; of counsel, Jack M. Graves, of Chrisman, Bynum & Johnson, P.C., Boulder, Colorado, for Respondent.

MEMORANDUM OPINION

Date Submitted: February 21, 1997
Date Decided: August 26, 1997

CHANDLER, Vice Chancellor.

Petitioners and respondent in appraisal proceeding seek to determine fair value of petitioners' shares based on corporation's future cash flows. Petitioners' proposed cash flow is rejected for failing to reflect the risk that the corporation will not be able to develop or to obtain critical products, for failing to use the proper tax rate, and for

failing to base the value of the cash flow's terminal value on comparable companies. Respondent's cash flow is accepted as accurately reflecting the corporation's value on the date of the merger. Interest on the fair value, which shall be compounded monthly from the date of merger to the date of payment, is set at the legal rate of interest.

I. BACKGROUND

This is an appraisal action pursuant to 8 *Del. C.* § 262. After completion of a tender offer whereby Network Systems Corporation ("NSC") obtained just over ninety percent of Vitalink Communications Corporation ("Vitalink"), NSC merged NSC Acquisition Corp., a wholly owned subsidiary of NSC, into Vitalink pursuant to 8 *Del. C.* § 253.[1] Charles L. Grimes ("Grimes"), owner of 200,000 shares of Vitalink common stock, and Gadfly Foundation, Inc. ("Gadfly"), owner of 1,900 shares, dissented from the merger. Grimes and Gadfly ("petitioners") seek to have their shares appraised as of the effective date of the merger, July 1, 1991.

Both parties have retained appraisal experts and have submitted valuations of petitioners' shares. That the parties have agreed to the use of a single valuation method significantly eases this Court's burden of determining the fair value of Vitalink and minimizes problems that may result from an attempt to combine results from several valuation methods.[2] In this case, the parties have valued

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[1] Respondent Storage Technology later acquired NSC.

[2] *See In the Matter of the Appraisal of Shell Oil Co.*, Del. Ch., Consol. C.A. No. 8080, at 82, Hartnett, V.C. (Dec. 11), *aff'd*, Del.Supr., 607 A.2d 1213 (1990) (noting difficulty of interchanging data between different valuation methods).

Vitalink using a discounted cash flow model–increasingly the model of choice for valuations in this Court.[3] The parties also agree that Vitalink's cash flows should be projected out over a five-year period commencing at the date of the merger. This Court has previously accepted valuations based upon such a time period.[4] Another area of agreement is the use of a comparable company analysis to value the terminal (residual) value of Vitalink at the end of the five-year forecast period, although the parties disagree as to which companies are comparable with Vitalink. The parties also agree that Vitalink's future cash flows should be discounted to present value at a rate of 20.83%. Finally, the parties agree on a number of adjustments that must be made to the present value of Vitalink's cash flows in order to arrive at the net present value of Vitalink's equity. With no reason to conclude that any of the areas in which the parties agree are not reflective of appropriate valuation methods and assumptions, I accept these methods and conclusions as accurate measures of Vitalink's fair value. Despite the numerous areas of agreement, this Court must still resolve several conflicting issues which lead to a $4.82 discrepancy between the fair value of the petitioners' shares

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[3] *See, e.g., Kleinwort Benson Ltd. v. Silgan,* Del. Ch., C.A. No. 11107, Chandler, V.C. (June 15, 1995); *TV58 Ltd. Partnership v.. Weigel Broadcasting Co.,* Del. Ch., C.A. No. 10798, Chandler, V.C. (July 22, 1993).

[4] *See Kleinwort Benson Ltd.,* Del. Ch., C.A. No. 11107. A five-year period may not, however, always be appropriate. Any time period selected should provide a representative forecast or historical sample of data. *Cf. Gonsalves v. Straight Arrow Publishers,* Del. Ch., C.A. No. 8474, at 15, Allen, C. (Nov. 27, 1996) (noting, in connection with an earnings capitalization model, that although the standard earnings base was five years, that time period is not necessarily the only period on which the method may be based.)

as calculated by petitioners ($13.32) and as calculated by the respondent ($8.50). These issues involve the assumptions underlying the selection or development of Vitalink's product and sales forecast, the selection of comparable companies by which to estimate Vitalink's terminal value, and the selection of Vitalink's tax rate as well as several issues surrounding the appropriate rate of interest which should accrue on the fair value of petitioners' shares from the merger date to the date of payment.

The focus of an appraisal proceeding is narrow. "[I]n a section 262 appraisal action the only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares."[5] The discussion below focuses only on the methods and data relied upon by the parties to arrive at their independent calculations of the fair value of petitioners' shares, and the extent to which the accuracy of the results might be affected by the credibility of the expert witnesses, their methods, and the sources of their information.[6] Further detail on the background of the events leading up to the merger may be found in this

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[5] *Cede & Co. v. Technicolor, Inc.*, Del.Supr., 542 A.2d 1182, 1187 (1988).

[6] *Rapid-American Corp. v. Harris*, Del.Supr., 603 A.2d 796, 802 (1992) ("the trial judge, as finder of fact in appraisal cases, enjoys the unique opportunity to examine the record and assess the demeanor and credibility of witnesses"); *Alabama By-Products Corp. v. Neal*, Del.Supr., 588 A.2d 255, 258 (1991) ("Where those assumptions [underlying expert valuations] are values supplied by others, the conduct of such other persons is probative of their credibility and of the information being supplied to the expert.").

Court's opinion *In re Vitalink Communications Corporation Shareholders Litigation.*[7]

II. VITALINK'S PRODUCT AND SALES FORECAST

The selection of the proper product and sales forecast accounts for just over fifty percent of the dollar difference between the two competing valuations. Petitioners argue that the proper forecast is that forecast developed by Vitalink's Assistant Vice President for Finance, Keith Glover ("Glover"). Respondent Storage Technology (NSC's successor in interest) asserts that Glover's forecast improperly reflects the existence and sale of products to which Vitalink did not have access and argues that the proper forecast results from a weighing of three forecasts reflective of the three most likely scenarios that Vitalink would encounter absent the merger.

A. *Petitioners' Forecast*

Petitioners' expert valuation witness is William Becklean ("Becklean").[8] His estimate of Vitalink's projected cash

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[7] Del. Ch., Consol. C.A. No. 12085, Chandler, V.C. (Nov. 8, 1991).

[8] Becklean is currently senior Vice President of Tucker Anthony Incorporated where he heads the technology research group. He holds degrees in engineering and business and is a Certified Financial Analyst. A friend of petitioner Grimes since 1954 (Tr. 22-24, 76-77), he has provided Grimes with investment advice (*Id.* at 130-31) and appears to have been a partner with Grimes in Capital Counsel, an investment management firm, from the late 1960s to the early 1970s (*Id.* at 130), although he also testified at trial that he was not involved in businesses other than Quantum Associates from 1968 to 1976. *Id.* at 63-64. While at Kidder, Peabody in 1988, he served as a research analyst for Vitalink's initial public offering. *Id.* at 69. He published several research reports on Vitalink from 1988 to 1991. *Id.* at 69-70. Becklean has never served as an expert witness in an appraisal action or any other litigation. *Id.* at 116.

flow for 1991 to 1995 is based on a financial forecast prepared by Glover.[9] Wes Saia ("Saia"), Vitalink's Chief Financial Officer, directed Glover to prepare the forecast for the benefit of Salomon Brothers Inc. ("Salomon") and Kidder, Peabody & Co. ("Kidder").[10] Salomon, who was preparing a fairness opinion for NSC, and Kidder, who was preparing a fairness opinion for Vitalink, provided Glover with guidance as to what types of information were required.[11]

The foundation of Glover's forecast was based on Vitalink's existing internal business plan. This document, which Vitalink generally updated every six months, projected Vitalink's net income, by quarter, for the next two years.[12] Glover began his task by updating the existing two-year 1991-1992 forecast to reflect actual results for the first and second quarters of 1991.[13] With information derived from Vitalink's internal models that projected Vitalink's sales out further than two years, and guidance from Vitalink's President and Chief Executive Officer Leslie Denend ("Denend") and Saia as to the appropriate overall growth rates, Glover extended the two-year forecast through to 1995.[14] Glover's final forecast, which he provided to Salomon and Kidder on April 19, 1991, provided Vitalink's

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9 *Id.* at 83-84, 204.

10 *Id.* at 204-06.

11 *Id.* at 206.

12 *Id.* at 212.

13 *Id.*

14 *Id.* at 210, 233.

estimated revenues by product line.[15] Becklean testified that he did not have any reason to believe that Glover's report was "anything but an accurate reflection of [Vitalink's] belief of what the business was going to produce over the next five years."[16]

B. *Respondent's Forecast*

Respondent's expert witness Kevin Dages ("Dages")[17] did not directly rely on Glover's forecast. Dages began his appraisal by examining valuations prepared by Kidder, Salomon and Ernst & Young in May and June 1991. He also examined previous reports prepared by Becklean and other industry analysts. Reviews of these reports and conversations with former Vitalink personnel convinced Dages that he would need to construct his own valuation.[18] Dages spoke to Denend, Vitalink's 1991 Vice President of Marketing, Vitalink's 1991 Vice President of Sales, and Vitalink's 1991 Associate Vice President of Software Engineering[19] and developed three separate forecasts

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[15] *See* PTX 39 (Project Star Analysis Prepared by Keith Glover, April 19, 1991); Tr. 232.

[16] Tr. 85.

[17] Dages is currently a principal at Chicago Partners, a litigation and economic consulting firm. *Id.* at 240. He has seven years of litigation consulting experience and several times has served as a consulting and testifying expert. *Id.* at 242-45. He has been a guest lecturer at the University of Chicago School of Business on the subject of valuations (*Id.* at 246-47), although he has no formal business education. He had no knowledge of Vitalink until he was hired for this case. (*Id.* at 353).

[18] *Id.* at 249.

[19] *Id.* at 221, 275-76, 305-06; Denend Dep. 64-66.

reflective of the three most likely scenarios Vitalink would encounter absent the merger.[20] The first scenario assumes that Vitalink would obtain router products through OEM relationships and supply these products to its existing customers while it simultaneously pursued internal development of its own router product.[21] This scenario assumes that Vitalink could retain its current bridge customers by providing them with third-party router products while developing its own product. The second scenario assumes that Vitalink is unable to negotiate an OEM relationship for the ELYNX and TLYNX products. Thus, Vitalink is unable to supply its customers with router products for 24 months while Vitalink develops these products internally.[22] The third scenario builds upon the second by assuming that the delayed development of a router product will hinder Vitalink's efforts to enter the market.[23] Dages estimated that Vitalink faced a sixty percent chance of experiencing the first scenario and a twenty percent chance of experiencing the second or third.[24]

C. *Analysis*

Glover's forecast admittedly does not reflect the going concern value of Vitalink on the date of the merger. By the time of the merger, Vitalink had fallen from its position as a leader in the computer internetworking industry. In the late 1980s and the early 1990s, Vitalink held a significant share

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[20] Tr. 249, 287-90; RTX 1 at 9.

[21] Tr. 287-89.

[22] *Id.* at 289.

[23] *Id.* at 290.

[24] RTX 1 at 35.

of the market for wide-area bridges, which allowed users to connect local area computer networks ("LANs") and to form wide-area networks ("WANs") by which information from one LAN could be transferred to a second LAN located on the same WAN. Each LAN in the WAN was attached to a bridge. All the bridges in the WAN were interconnected. Packets of information transmitted from a location on one LAN to that LAN's bridge would be forwarded by the bridge to each of the other bridges on the WAN. Each of these other bridges could then determine if the information was addressed to a location on its LAN. Bridges were limited by their inability to recognize addresses for any location other than locations on their own LAN. Thus, when they received a packet of information from their LAN, addressed to a location outside that LAN, the bridge forwarded the packet to each of the other bridges, rather than to only the bridge on the LAN containing the packet's intended recipient.

A second form of technology, routers, also allowed users to connect LANs and to transmit information from one LAN to another. Unlike bridges, however, routers were able to determine to exactly which bridge a packet of information should be transmitted. The advantages of routers were clear and by the early 1990s development and production of routers was the fastest growing segment in the industry.[25]

Denend, who had been hired as Vitalink's President and CEO in October 1990, and appointed as Vitalink's Chairman in January 1991, recognized the need for Vitalink to obtain a competitive router for its customers. Vitalink

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[25] Tr. 75 (Becklean).

considered two different router sources: internal development and provision by third parties either through a relationship with an original equipment manufacturer or a merger with a company that had developed its own router product.[26]

The need for Vitalink to obtain a router product was urgent. Revenues were declining rapidly. Vitalink was late in entering a market that Denend believed was growing at least fifty percent per year.[27] There were concerns that its loyal customers would not remain loyal while Vitalink sought to provide them with routers or technology that would enable them to make the transition to routers.[28]

Some customers were already leaving.[29] Vitalink's management knew that survival depended upon Vitalink's ability to assist its customers in making the transition from bridges to routers. At the time of the merger, Vitalink did not have a competitive router product for its customers. Nor did Vitalink have access to a product through a third party OEM. It was attempting to develop a router internally. To ease the pressure from its bridge customers, who wished to switch to routers, Vitalink provided them with the TransPATH router consisting of bridge hardware linked to router software that provided minimal router functions.[30] Vitalink viewed the TransPATH as a stepping stone from its

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26 Denend Dep. at 32, 42.

27 *Id.* at 87-88.

28 *Id.* at 41-42.

29 *Id.* at 31.

30 *Id.* at 25-26.

past leadership in bridges to its future in routers.[31] Vitalink planned to upgrade the TransPATH software while working to develop the LYNX–its own internal version of a router.[32] Initially Vitalink had intended to create a new code for the LYNX but this was abandoned in favor of adapting the code for TransLAN, its bridge product, for use with the LYNX.[33] The difficulties in working with this code were significant.[34] Denend was concerned about Vitalink's ability to have a functional router code available by the time the router hardware was complete.[35] In his presentation to the Board in March, Denend stated that Vitalink's customer base was looking elsewhere for router products, that "Vitalink's credibility as a company capable of developing or introducing leadership products has eroded severely" and that Vitalink would not have a competitive product ready "until the end of 1991, at the earliest."[36]

Denend's Rebuilding Shareholder Value Report dated April 1, 1991 (an earlier version of which had been prepared for presentation to Vitalink's Board of Directors in March), states that Vitalink's current strategy was based on the *assumption* that Vitalink would be able to return to "market leadership" within 18 to 24 months.[37] It also notes

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31 *Id.* at 27.

32 *Id.* at 26.

33 *Id.* at 32-33.

34 *Id.* at 16-18, 27-31.

35 *Id.* at 33.

36 PTX 22 at VC006026 (Documentation for Vitalink's Feb. 25, 1991, Board Meeting).

37 PTX 35 at VC002765.

that "[r]ecent market developments have increased the risk of implementing Vitalink's strategy successfully" and that Vitalink faced a threat "that there will not be enough time for Vitalink to return to market leadership position before a dominant supplier emerges in the interconnect market."[38]

Kidder's April 9, 1991 report to Vitalink's Board listed several factors that were viewed as hindering Vitalink's ability to make a successful transition from bridges to routers:

- Expertise is concentrated in shrinking remote bridge market
- Multi-protocol offerings are currently not available
- Multi-protocol offerings will be late and not competitive with *current* products offered by industry leaders
- Low-product development credibility
- Engineering resources are inefficient
- Customer base migration is accelerating[39]

As a result of these factors "Kidder, Peabody recommend[ed] that Vitalink proceed with a negotiated sale process."[40]

In May 1991, Maureen Lawrence, Vitalink's Vice President of Marketing, authored a short presentation

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38 *Id.*

39 RTX 29 at KP000009.

40 *Id.* at KP000021.

entitled *Vitalink Product Plans* that revealed that if the merger with NSC were not completed, Vitalink would need to develop an entirely new software code.[41]

Salomon also completed its evaluation of Vitalink in preparation for the merger and presented its conclusion to NSC's Board in May 1991. It reported that Vitalink's sales of bridges were declining, that the stock market lacked confidence in Vitalink's "ability to introduce a successful router product,"[42] and noted that even a combined Vitalink-NSC entity would be "playing 'catch-up' " in the router market that was dominated by other companies who "already have an established and growing position."[43]

Glover's forecast does not reflect Vitalink's difficulties in providing a router product to its customer base. His forecast, which was broken down by product line,[44] reveals that Vitalink projected that the LYNX products would provide approximately forty-five percent of Vitalink's sales revenues in 1992.[45] Petitioners argue that such a percentage is entirely consistent with Vitalink's position, acknowledging that Vitalink had initially predicted release of a router product in July but noting that no Vitalink document places release of the router later than the end of 1991. They argue that the 18-24 month time period to

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41 RTX 24 at VA003503; Denend Dep. at 58.

42 PTX 50 at S 0000008, S 0000009 (Project Highway).

43 *Id.* at 0000008.

44 PTX 37 at S0001556.

45 *Id.* ($6,821,000 from TLYNX + $22,467,000 from ELYNX represents approximately forty-five percent of the $65,000,000 total revenue forecasted for 1992).

return to "market leadership" was just that–a time estimate for *leadership,* not initial product sales. Respondent notes that Vitalink documents admit the need to develop entirely new software *only after* the report containing the 18-24 month schedule was released. Thus, respondent contends that only its scenarios, which reflect the existence of this delay, are an accurate projection of Vitalink's prospects absent the merger.

I do not find it necessary to resolve the exact date by which Vitalink would have a router product available for its customers. Glover, the author of the forecast upon which Becklean relies, testified that he understood that the ELYNX and TLYNX product development programs were late and that this delay could have affected the two-year forecast.[46] When asked if that concern was reflected in the five-year forecast, Glover explained that in preparing the five-year forecast Vitalink was "assuming availability, if you will, of a router product. It was just going to be supplied by Network Systems vis-a-vis the merger."[47] Petitioners attack Glover's testimony claiming that it "makes no sense,"[48] that no one ever instructed Glover to exclude the risk that Vitalink would not be able to develop or obtain router products according to the schedule reflected in the two-year business plan, and that Kidder and Salomon both thought they were receiving a "stand-alone" forecast. Whether this is true or not, does not matter. *Glover* prepared the forecasts. *Glover* testified that the forecast did not reflect what he knew to be a fact (that the development of the

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[46] Tr. 216, 238.

[47] Tr. 216-17.

[48] Petitioners' Post-Trial Reply Br. at 13.

router was late) and that the forecast *assumed* the router would be availab[illegible], if not from Vitalink, then from NSC. Glover, in fact, testified that it was not his forecast, but Dages' three forecasts which were the three most likely scenarios Vitalink would encounter absent the merger although he placed slightly different weights on the three scenarios, believing that Vitalink had a fifty percent chance of experiencing the first scenario (the OEM scenario) and a twenty-five percent chance of experiencing the second and third scenarios.[49] Glover, thus, believed Vitalink had an even lower chance of being able to pursue the OEM scenario (the most favorable scenario of the three) than Dages. Moreover, Glover's forecast inappropriately includes sales revenues from products (other than the LYNX or companion router products) to which Vitalink did not have access. These revenues were expected to be captured through the sales of ENS and SNA products provided by Coral and Netlink, but neither product was available at the time Glover prepared the forecast and petitioners have provided no evidence that the OEM relationships existed and that the products were available at the time of the merger.[50] Glover's forecast may have been helpful to Vitalink as a prediction of what Vitalink might sell in the event that it merged with NSC, obtained router products from a third source or developed a router product internally, as Vitalink recognized the need to pursue one of these paths to make the transition from bridges to routers. The forecast is not, however, an appropriate forecast for a section 262 appraisal proceeding. Because it assumes the existence and sale of products that Vitalink did not then have the ability or

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[49] Tr. 223.

[50] *Id.* at 214-15.

right to provide, Glover's report is not an accurate projection of Vitalink on a stand-alone basis prior to the merger.

Petitioners, relying on *Cede & Co. v. Technicolor,*[51] argue that even if Glover's report assumed the availability of routers from another source, that Glover's forecast is nonetheless the proper forecast upon which to base an appraisal because it reflects the assumptions under which Vitalink was operating immediately prior to the merger. Petitioners assert that Vitalink's plan to sell routers is similar to Technicolor's assumption that it would proceed with the "Perelman plan" to sell certain assets of Technicolor and is, therefore, according to *Cede & Co. v. Technicolor,* an operating assumption that this Court must include when determining the fair value of petitioners' shares on the date of the merger.

Focusing on the similarities, petitioners ignore the significant differences between the ability of Technicolor to sell its assets and the ability of Vitalink to sell routers. There were no barriers in the way of Technicolor. What petitioners refer to as the "Perelman plan" was a course of action which "was the operative reality on the date of the merger."[52] The plan involved the sale of certain assets that Technicolor already owned. Vitalink, by contrast, did not own the assets it intended to sell and *petitioners have provided no evidence that NSC, owner of just over ninety percent of Vitalink as of the date of the merger, was willing, or even able, to provide router products. Petitioners, in fact, provide no evidence of any value added by NSC*

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[51] Del.Supr., 684 A.2d 289 (1996).

[52] *Id.* at 298.

between the date on which it obtained majority control and the date on which petitioners became entitled to appraisal rights. As of the date of the merger, Vitalink did not have an agreement with a third party to supply routers, Vitalink did not have the power to force a third party to provide routers, and Vitalink did not have the ability to provide those products internally. Vitalink' power was limited to the ability to negotiate with others and to continue to seek to overcome its own internal development problems and to produce a competitive router.

The risk that Vitalink might not be able to consummate an OEM relationship or that Vitalink might not be able to develop a competitive router product must be, but is not, reflected in the product sales forecast prepared by Glover and relied upon by Becklean. Accordingly, Glover's forecast is not an accurate reflection of the future prospects of Vitalink on the date of the merger. Petitioners argue that Dages' product forecasts are also subject to criticism. First, petitioners contend that Dages unjustifiably pushed back development of router products. Considering the fact that petitioners' time frame for development is reflected in Glover's forecast, and Glover concedes that that time frame assumed away risks of development, I find Dages' time frame for development to be reasonable, especially since Vitalink experienced further developmental setbacks between the time when Glover's forecast was first prepared and the time at which petitioners obtained the right to seek appraisal. Petitioners also criticize Dages for supporting his forecast on external documents and fairly limited contact with Vitalink employees. Yet petitioners' expert, Becklean, did not contact *anyone* at Vitalink to confirm Glover's report. It appears that Becklean simply assumed that Glover's report was an accurate reflection of Vitalink as of

the date of the merger. Because I find otherwise, I reject Becklean's reliance on Glover's report and accept the three product forecasts constructed by Dages because I find that Dages' weighting of these three forecasts accurately reflects the value of Vitalink on July 1.

III. COMPARABLE COMPANY ANALYSIS

The parties' use of different comparable companies to calculate the terminal value accounts for just over forty percent of the dollar difference between the two valuations. The differences in the lists of selected companies largely result from the two different views of the expected profitability and success of Vitalink in 1995–at the end of the cash flow period.

A. *Petitioners' Selection*

Both parties employed a comparable company analysis to determine Vitalink's terminal value in 1995. A company's terminal value is the estimated value of the company at a date in the future. To determine this value, the parties each selected a list of companies whose current performance they believed would be comparable to Vitalink in 1995. Each party's list of comparable companies was a subset of ten comparable companies selected by Kidder which had divided these ten companies into an "upper tier" and a "lower tier" based on the differences among their sales, earnings before interest and taxes, net income, return on assets and return on equity. As Kidder's report explained, the upper and lower tier groups exhibited "dramatically different valuation multiples" with the disparity between the sets of numbers resulting from "recent financial performance as well as the perception that upper

tier companies are well positioned for the future."[53] Becklean's selected comparable companies were Cabletron, cisco, SynOptics and 3Com. Three of these four companies appeared in Kidder's upper tier. Becklean selected these companies because he believed they "were the only publicly traded companies at the time primarily engaged in the design, manufacture and marketing of hardware for use in constructing local and wide area data networks (LANs and WANs)" and that this was "the same market served by Vitalink."[54]

In his report, Becklean explained that price/earnings (P/E), price/earnings before accounting for interest and taxes (P/EBIT), price/earnings before interest but after taxes (P/EBIAT), and price/earnings before interest, taxes and depreciation (P/EBITD) are ratios commonly used to determine a company's terminal value through comparison to similar companies. Because of Vitalink's large cash position, Becklean did not believe that a P/E ratio would accurately reflect Vitalink's terminal value. Accordingly, he employed each of the above ratios except for P/E.

Dividing each comparable company's market capitalization by its EBIT, EBITD, and EBIAT, Becklean obtained a series of three figures representing that comparable company's "multiples."[55] He then averaged the four companies' results for each multiple to obtain an

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[53] RTX 29 at KP 000006.

[54] PTX 4 at 2-3 (Valuation of Vitalink Communications Corporation prepared by William R. Becklean, Nov. 18, 1996).

[55] For example, Becklean determined Cabletron's market capitalization was $997.7 million and its EBIT was $63.0 million. Therefore, Cabletron's EBIT multiple was 15.8 ($997.7/$63).

average EBIT multiple of 11.5, and average EBIAT multiple of 18.7 and an average EBITD multiple of 10.0. Applying these averages to Vitalink's EBIT, EBIAT and EBITD, he obtained three comparable values of Vitalink's terminal value that averaged to $240 million.

B. *Respondent's Selection*

Dages performed a similar analysis but based his comparison on Digital Communications Associates, General Datacomm Industries, Network Equipment Technologies, Network Systems, Newbridge Networks, and 3Com. These are the companies appearing in Kidder's lower tier group and are the companies on which Kidder based its May 5, 1991 valuation of Vitalink's future terminal value.[56]

C. *Analysis*

The difference between Kidder's upper and lower tier multiples was addressed by this Court in *In re Vitalink Communications Corporation Shareholders Litigation*.[57] The focus of the inquiry at that time was whether Kidder's valuation was reliable information on which Vitalink's Board could judge on May 6, 1991, the fairness of NSC's offer. I concluded that Kidder's exclusion of the upper tier companies from its comparable company analysis was appropriate and that such exclusion made the valuation more reliable than a valuation based on exclusion of both the upper "upper tier" and the lower "lower tier" companies. My reasoning at that time was based on the fact that

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[56] PTX 2 at KP000064; Valdez Dep. at 30.

[57] Del. Ch., Consol. C.A. No. 12085, Chandler, V.C. (Nov. 8, 1991).

"Vitalink clearly had become a lower tier company."[58] Petitioners provide no evidence that Vitalink's outlook had improved, rather than continued to decline, between May 6, 1991 and July 1, 1991. Moreover, I find no support for Becklean's conclusion that the upper tier companies were more closely comparable to Vitalink than the remaining companies on Kidder's list.[59] Accordingly, I find no reason to conclude that Vitalink or the comparable companies had changed sufficiently to warrant the selection of Becklean's rather than Kidder's/Dages' selection of comparable companies.

IV. VITALINK'S TAX RATE

The final difference between the two valuations is the selection of Vitalink's tax rate. This difference accounts for just under ten percent of the difference between the two valuations. An adjustment to the tax rate is the only adjustment Becklean made to Glover's forecast. Becklean adjusted the 20.8 to 28 percent tax rates contained in Glover's forecast to reflect the fact that tax-free investments represented thirty-five percent of Vitalink's investment portfolio. Thus, assuming that Vitalink would maintain the same percentage of tax-free investments, Becklean adjusted Glover's forecast to reflect effective tax rates of 30.9 to 34.1 percent.[60]

Dages also adjusted upward the tax rates in Glover's report. Noting that Vitalink's most recent annual report listed a forty-percent tax rate for 1988 to 1990, Dages

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[58] *Id.* at 20.

[59] *See* Valdez Dep. at 14-15.

[60] Tr. 89-90, PTX 4 Ex. 1.

applied that rate across the five-year time period 1991 to 1995.

I find that the appropriate tax rate is Dages' tax rate of forty percent, which is Vitalink's tax rate for the previous three years. In addition, Dages' forty-percent tax rate is similar to the tax rates used in the analyses of Kidder and Salomon.

V. POST-MERGER INTEREST RATE

In addition to the differences between the two estimates of value, the parties differ as to 1) the proper method of calculating the rate at which interest should accrue on the fair value of petitioners' shares from the date of the merger to the date of the payment and 2) whether the awarded interest should be simple or compound. These are issues with which this Court is most familiar.[61]

An award of interest is discretionary but "the general rule is that an award of interest is routinely made unless the

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[61] *Kleinwort Benson Ltd.*, Del. Ch., C.A. No. 11107; *Wacht v.. Continental Hosts, Ltd.*, Del. Ch., C.A. No. 7954, Chandler, V.C. (Dec. 23, 1994); *Chang's Holdings v. Universal Chems. & Coatings, Inc.*, Del. Ch., C.A. No. 10856, Chandler, V.C. (Nov. 22, 1994); *Neal v. Alabama By-Products*, Del. Ch., C.A. No. 8282, Chandler, V.C. (Jan. 10, 1994); *TV58 Ltd.*, Del. Ch., C.A. No. 10798; *Cooper v. PabstBrewing Co.*, Del. Ch., C.A. No. 7244, Hartnett, V.C. (June 8, 1993); *Salomon Brothers Inc. v. Interstate Bakeries Corp.*, Del. Ch., C.A. No. 10054, Berger, V.C. (May 1, 1992); *In the Matter of the Appraisal of Shell Oil Co.*, Del. Ch., Consol. C.A. No. 8080, Hartnett, V.C. (Dec. 11), *aff'd*, Del.Supr., 607 A.2d 1213 (1990); *Harris v. Rapid-American Corp.*, Del. Ch., C.A. No. 6462, Chandler, V.C. (Oct. 2, 1990), *aff'd in part, rev'd in part on other grounds*, Del.Supr., 603 A.2d 796 (1992); *Neal v. Alabama By-Products Corp.*, Del. Ch., C.A. No. 8282, Chandler, V.C., (Aug. 1, 1990), *aff'd*, Del.Supr., 558 A.2d 255 (1991); *Pinson v. Campbell-Taggart, Inc.*, Del. Ch., C.A. No. 7499, Jacobs, V.C. (Feb. 28, 1989).

petitioner brought the action in bad faith."[62] Each party bears the burden of proving an appropriate rate under the circumstances.[63] There is no specific formula used to establish an appropriate rate of interest.[64] When the parties fail to develop a sufficient record, the legal rate of interest may be appropriate. Eight *Del. C.* § 262(h) provides that "the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding." Furthermore, pursuant to section 262(i), the award of interest "may be simple or compound, as the Court may direct."[65]

An award of interest serves two purposes. First, an award of interest recognizes that petitioners, by electing to pursue appraisal rather than accepting the amount offered in the merger, have been denied the use of the fair value of their shares.[66] Second, an award of interest recognizes that the corporation has received a benefit from the use of the fair value of petitioners' shares during the pendency of the

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62 *Cooper,* Del. Ch., C.A. No. 7244, at 26.

63 *Pinson,* Del. Ch., C.A. No. 7499, at 17 ("In an appraisal action, each side has the burden of proving its respective valuation position. No presumption, favorable or unfavorable, attaches to either side's valuation, including the actual merger price.").

64 *Chang's Holdings,* Del. Ch., C.A. No. 10856, at 1-2; *Charlip v. Lear Siegler, Inc.,* Del. Ch., C.A. No. 5178, at 5-6, Walsh, V.C. (July 2, 1985); *Pinson,* Del. Ch., C.A. No. 7499, at 55.

65 *See also Rapid-American Corp.,* 603 A.2d at 808 (" § 262(i) clearly gives the trial court absolute discretion to determine the form of interest it will award in a statutory appraisal action.").

66 *Chang's Holdings,* Del. Ch., C.A. No. 10856, at 2.

proceeding.[67] Neither purpose is intended to reflect culpability on behalf of either party. This Court, recognizing that a single rate may not perfectly reflect both purposes, has frequently considered two rates: one reflecting the rate necessary to compensate petitioners for the loss of the use of their funds and one reflecting the benefit obtained by the corporation.[68] While the decision to enact a short-form merger, as well as the decision to seek appraisal, are statutory rights, which are not accompanied by presumptions of wrongdoing,[69] there may be times when the actions of one party cause a delay in the appraisal proceedings and place an unfair burden on the opposing party. Any such burden may be recognized by weighting the compensatory and restitutionary rates to reflect the

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[67] *Kleinwort Benson Ltd.*, Del. Ch., C.A. No. 11107, at 23; *Chang's Holdings*, Del. Ch., C.A. No. 10856, at 2; *Cede & Co. v. Technicolor, Inc.*, Del. Ch., C.A. No. 7129, at 81, Allen, C. (Oct. 19, 1990), *rev'd in part on other grounds*, Del.Supr., 634 A.2d 345 (1990). Prior to the 1981 amendment of the appraisal statute, this Court frequently recognized only the first of these purposes. *See, e.g., Lebman v. National Union Elec. Corp.*, Del. Ch., 414 A.2d 824, 829 (1980); *Universal City Studios, Inc. v. Francis I. duPont & Co.*, 334 A.2d 216 (1975). The 1981 amendment, which specifically invited this Court to consider the corporation's cost of borrowing, recognizes the second purpose. *See Chang's Holdings*, Del. Ch., C.A. No. 10856, at 2-3; *Cede & Co. v. Technicolor, Inc.*, Del. Ch., C.A. No. 7129, at 81, Allen, C. (Oct. 19, 1990), *rev'd in part on other grounds*, Del.Supr., 634 A.2d 345 (1990). *But see Rapid-American Corp.*, 603 A.2d at 809 (Court addresses only the first factor).

[68] *See, e.g., Kleinwort Benson Ltd.*, Del. Ch., C.A. No. 11107; *Wacht*, Del. Ch., C.A. No. 7954; *Chang's Holdings*, Del. Ch., C.A. No. 10856; *Cooper*, Del. Ch., C.A. No. 7244; *Salomon Brothers Inc.*, C.A. No. 10054.

[69] *Rapid-American Corp.*, Del.Supr., 603 A.2d at 808 (1992) ("There is no punitive aspect of an appraisal proceeding.").

extent to which each party contributed to a delay, if any, in the proceedings. Petitioners, noting that one purpose of an award of interest is to compensate the dissenting or cashed-out shareholders for the loss of the use of their money, argue that the only way in which petitioner Grimes will be compensated for the loss of the use of his funds is for this Court to award a rate of interest equal to the rate of return on Grimes' investments.[70] In the alternative, petitioners suggest that interest be awarded at the rate of 20.83%, which is the rate at which the parties have agreed to discount Vitalink's future cash flows back to the date of the merger. In either case, petitioners seek interest compounded monthly.

Respondent offers two sets of interest rate calculations. The first, a slight modification on the prudent investor rate adopted by this Court in *Chang's Holdings,* reflects a compensatory goal. The second is a rather elaborate calculation of the benefit that NSC and respondent obtained from the use of petitioners' funds during the pendency of this proceeding. Asserting that neither party has unjustly contributed to the delay in these proceedings, respondent suggests that the Court weight the two rates equally. Respondent's calculations support a request of 6.5% simple interest.

A. *The Appropriate Interest Rate*

Neither petitioners' nor respondent's calculations provide reliable estimates of the appropriate rate of interest. Petitioners' interest rate arguments focus on the compensatory principle. They argue that only a rate based

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[70] For reasons explained below, evidence of Grimes' investment returns was excluded at trial.

on actual investment returns or the discount rate accepted by both parties would adequately compensate petitioners for the loss of the use of their funds. Awarding interest based on investment returns, according to petitioners, "reduces the corporation's incentive to delay the litigation" and supports the "long standing principle of Delaware tort law that the defendant takes the plaintiff as he finds him."[71] Thus, petitioners argue that because Grimes was "involuntarily" removed from Vitalink and because the only way Grimes could continue to invest in similar companies with the funds he had invested in Vitalink was to accept the "meager amounts" offered in the merger, he should be compensated for the loss of the use of his funds at the same rate of return he achieved by investing in similar high-risk, high-return companies.

Petitioners fail to recognize that an appraisal proceeding is not akin to an action in tort.[72] The decision to enact a short-form merger is not tortious conduct. Allegations of wrongdoing associated with the decision to enact the merger such as breaches of fiduciary duty may be asserted in an action for damages. They will not be recognized here. Furthermore, petitioners' election to exercise their statutory right to reject the merger amount and to pursue appraisal does not shift to the corporation all responsibility for losses they may incur as a result of their inability to use the funds retained by the corporation. Petitioners could have mitigated their losses and obtained perfect compensation for the loss of the use of their funds by borrowing the fair value of their shares. Respondent correctly notes that this Court has

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[71] Petitioners' Opening Post-Trial Br. at 32-33.

[72] *Rapid-American Corp.*, 603 A.2d at 808 (1992) ("the purpose of an appraisal proceeding is not to punish the respondent corporation.").

repeatedly rejected the use of a petitioner's investment rate of return (as a rate reflective of the compensatory principle) in favor of an objective standard.[73] Evidence of petitioner Grimes' specific investment returns is irrelevant and was excluded at trial. In the alternative, petitioners seek a rate of interest based on the rate selected by the parties to discount Vitalink's future cash flows. Petitioners have not explained how this rate, which the parties have agreed to use to discount Vitalink's future cash flows, reflects either petitioners' loss of the use of their funds or respondent's benefit obtained from the use of petitioners' funds. Thus, I find that neither of petitioners' proposed rates are reflective of a rate that would compensate them for the loss of the use of their funds or force the corporation to disgorge the benefits obtained from the use of their funds.

Respondent purports to provide rates based on the principles expounded in *Chang's Holdings*. Respondent calculated the average cost of its (or NSC's) debt for each year since July 1991 by first determining the 1) annual amount of cash and short-term investments and 2) annual long-term debt. Respondent then determined, for each year, three different types of interest rates. The first rate reflected the average rate on available short-term investments. The second rate reflected the average rate paid on existing long-term debt. The final type of rate provides two figures for available rates on contractual commitments. For each year, respondent then selected one of the four rates as the rate most reflective of the cost of debt.

For several reasons I cannot conclude that respondent's proffered data on the cost of borrowing is accurate–as a

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[73] *See, e.g., Chang's Holdings*, Del. Ch., C.A. No. 10856, at 9.

reflection of the cost of borrowing or the cost of debt.[74] First, respondent has failed to explain adequately why some figures are actual rates and some rates are only estimates of rates available. Second, neither Dages' report, nor the briefs, nor trial testimony reveals the actual types of short-term investments held by respondent (or NSC) or the sources of the figures.[75] Third, the report fails to provide interest rates for long-term debt in 1991, 1992, 1993 or 1994. Fourth, there is no indication of what percentage of debt was obtained pursuant to the contractual obligations. Depending on the method used to select the representative yearly rate, these omissions might not affect the result. In this case, however, respondent's method appears to have little justification. For example, any year in which respondent (or NSC) had more than $100,000,000 in cash and short-term investments, the selected yearly rate was not that rate which was obtained on short-term investments, but that rate at which further short-term funds allegedly could be obtained. This use of the rate required to obtain further funds rather than the return it actually achieved on its own investments, implicitly acknowledges that petitioners should not bear the risk of respondent's particular investments and

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[74] If the purpose of a restitutionary rate is to force the corporation to forgo the *benefits* obtained from the use of petitioners' funds, then perhaps the corporation's cost of debt is not the only factor this Court should consider. Respondent, like other publicly held corporations, has two sources of funds: equity and debt. Debt, backed by security and a superior claim on the firm's assets, is obtainable at a lower cost than equity, which is unsecured and carries only a residual claim on the firm's assets. But both sources provide funds for the corporation's use. Thus, the *benefit* obtained from the use of additional funds may be more appropriately reflected through a weighted average of the two sources.

[75] At trial, Dages revealed that the long-debt figures were obtained from Vitalink's annual forms 10 Q.

that respondent's benefit may be accurately measured by its cost of obtaining further funds. There is no evidence, however, that the short-term rate provided was the rate available to respondent or NSC, rather than a blend of the rates offered on commercial paper and treasury bills. Moreover, according to respondent's methodology, for years when NSC or respondent did not have over $100,000,000 in cash and short-term investments, the selected rate would have been the actual rate of long-term debt, except that rate was unavailable for those years, so respondent selected the higher of the two contractual rates. I fail to understand why, when respondent or NSC had more than $100,000,000 in cash and short-term investments that the benefit received from the use of petitioners' funds is most appropriately reflected by the rate reflecting the cost of additional *short-term* funds. Why, for example, is the *benefit* best reflected by the "available" short-term rate for 1995, rather than the long-term "actual" rate it paid on debt when for that year respondent had $264,502,000 in cash and short-term investments and $449,222,000 in long-term debt?[76] Vitalink could have used some of its short-term investments to pay down its long-term debt. The fact that it did not may indicate that its business required the liquidity provided by the short-term investments and that further short-term funds were not available at a rate less than that available on its long-term loans. In any case, the cost of

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[76] *See Ryan v. Tad's Enterprises, Inc.*, Del. Ch., C.A. Nos. 10229, 11977, at 48, Jacobs, V.C. (Apr. 24, 1996) (responding to argument that cash-rich corporation would not need to borrow and thus derived no benefit from holding plaintiffs' funds by noting that even a cash-rich corporation derived benefit from the use of funds at no cost and concluding that the benefit should therefore, "be considered in determining a fair rate of interest during the period that the defendants had the cost-free use of plaintiffs' funds.").

short-term debt is not an appropriate measure of the benefit obtained from the use of petitioners' funds.

With respect to a rate that would compensate petitioners for the loss of the use of their funds respondent, on one hand, argues for investments of the type accepted by this Court in *Chang's Holdings*.[77] On the other hand, respondent argues that petitioners, once electing to perfect their appraisal rights, assume the status of debtors to the corporation, not investors. Petitioners object to the use of a rate based on the prudent investor standard, arguing that the expected risk and return of their investment in Vitalink is not reflected in the investments which make up the prudent investor standard. I agree that an investment in Vitalink is not likely to be considered by any Court to be an accepted investment under the prudent investor standard. Although I am sympathetic to petitioners' claim that their investment in Vitalink demonstrates that the prudent investor rate would not reflect the risk and return of their investments, respondent is correct in its assertion that petitioners' decision to reject the merger and to seek appraisal removes them from the status of shareholder and places them in the position of a creditor to the corporation. Their former status as shareholders is not relevant to the determination of interest.[78] Yet a compensatory rate of interest based on petitioners' position as a creditor must reflect the fact that

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[77] Respondent's selected investments are similar to those employed by this Court in *Chang's Holdings* in all but two of the six categories.

[78] *See Southern Production Co., Inc. v. Sabath*, Del.Supr., 87 A.2d 128, 134 (1952) (The status of a petitioner who has perfected a right to appraisal "is primarily that of a monetary claimant against the consolidated or surviving corporation, and is more nearly analogous to that of a creditor than to that of a stockholder.")

petitioners are *involuntary* creditors to a *specific corporation* with its own unique risk of defaulting on the loan. Thus, the petitioners are correct when they assert that the particular risk of the party holding their funds should be considered in the selection of the proper compensatory rate. But, because I believe that petitioners' election to exercise their statutory right to reject the merger amount and to pursue appraisal does not shift to the corporation all responsibility for losses they may incur as a result of their inability to use the funds retained by the corporation, and because petitioners could have mitigated their losses and obtained perfect compensation for the loss of the use of their funds by borrowing the fair value of their shares, I believe the proper way to reflect the specific risk borne by the petitioners would be to adjust the petitioners' cost of borrowing funds to reflect the risk that, by the time the appraisal proceeding had concluded, the surviving corporation would be unable to repay the retained funds. This risk is, perhaps, best reflected by the surviving corporation's cost of borrowing for similarly secured funds.[79]

Exactly which of respondent's several "available" and "actual" rates would serve this purpose is unclear. The rates

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[79] *Cf. In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1332 (7th Cir.1992) (The Court noted that an involuntary tort creditor faces a risk that the defendant will not be able to meet its obligations. "The defendant may go out of business (or encounter less serious reverses), or hide assets, during the litigation. Any market interest rate reflects three things: the social return on investment (that is the amount necessary to bid money away from other productive uses), the expected change in the value of money during the term of the loan (*i.e.*, anticipated inflation), and the risk of nonpayment. The best estimate of these three variables is the amount the defendant must pay for money, which reflects variables specific to that entity.").

offered by respondent range from 3.2% to 5.8% on short-term funds, 7 .7% to 7.8% for long-term loans (although the rates for 1991 through 1994 are missing), 6.0% to 8.8% for contractual loans based on the prime rate and 3.3% to 6.5% for contractual rates based on the ninety-day LIBOR. I decline to consider the proffered short-term rates because respondent has not shown that these rates, which were based on a mixture of commercial paper, treasury bills, and treasury notes, were available to respondent. Certainly the rate that respondent would have had to pay to attract funds would have been higher than the rate available on treasury bills. Likewise, I decline to consider the contractual rates as respondent has failed to explain whether these were rates at which it loaned money to third parties or rates at which it had the right to obtain funds from third parties. Thus, the only potentially helpful interest rate information is respondent's cost of long-term debt. Alas, that provides little guidance. The rate only represents the borrowing rate of respondent Storage Technology from 1995 to September 1996. There is no information documenting NSC's cost of debt prior to that time and thus no way in which to determine a rate reflective of the rate that creditors would have charged NSC from 1991 to 1994 to reflect the risk that NSC would be unable to repay the fair value of petitioners' shares. Concluding that neither side has provided evidence of the proper rate of interest, I award interest at the legal rate calculated as described below.[80]

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[80] *Cf. Cooper*, Del. Ch., C.A. No. 7244 ("When, as here, none of the parties establishes a value that is persuasive, the Court must make a determination based upon its own analysis."). *See also Chang's Holdings*, Del. Ch., C.A. No. 10856, at 6 ("The legal interest rate serves as a useful default rate when the parties have inadequately developed the record on the issue.").

B. *Simple or Compound Interest?*

Prior to the 1987 amendment of section 262(i), this Court held that it did not have authority to award compound interest.[81] The 1987 amendments, however, provided that "[i]nterest may be simple or compound, as the Court may direct."[82] Our Supreme Court has repeatedly confirmed that either method is within this Court's discretion.[83] Despite the clear authority to award simple or compound since 1987, this Court has elected to award compound interest only once.[84] The reasons for continuing to award simple interest since 1987 have not been fully explained.[85] Nor was the

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[81] *See Charlip*, Del. Ch., C.A. No. 5178, at 9-12.

[82] 66 *Del. Laws*, Ch. 136, § 32.

[83] *Cede & Co.*, 684 A.2d at 301; *In the Matter of the Appraisal of Shell Oil Co.*, 607 A.2d at 1221.

[84] *See Cede & Co.*, Del. Ch., C.A. 7129, at 79 (Oct. 19, 1990); *Id.* Dkt. 55 (Restated Modified Order and Final Judgment).

[85] *See, e.g., Gonsalves*, Del. Ch., C.A. No. 8474 (no discussion); *Kleinwort Benson Ltd.*, Del. Ch., C.A. No. 11107 (no discussion); *Wacht*, Del. Ch., C.A. No. 7954 (no discussion); *Chang's Holdings*, Del. Ch., C.A. No. 10856, at 11 (Court not persuaded that it should diverge from general practice of awarding simple interest); *Salomon Brothers Inc.*, C.A. No. 10054 (no discussion); *In the Matter of the Appraisal of Shell Oil Co.*, Del. Ch., Consol. C.A. No. 8080, (no discussion); *Harris*, Del. Ch., C.A. No. 6462, at 43; *aff'd in part, rev'd in part on other grounds*, Del.Supr., 603 A.2d 796 (1992) (Court chose "not to depart from [the] Court's standard practice of allowing only simple interest."); *Neal*, Del. Ch., C.A. No. 8282, *aff'd*, Del.Supr., 558 A.2d 255 (1991) (no discussion); *Pinson*, Del. Ch ., C.A. No. 7499 (no discussion); *Charlip*, Del. Ch., C.A. No. 5178, at 10-11.

reason for awarding compound.[86] As our Supreme Court noted in 1992, "no Delaware case has ever explicitly considered the factors which determine whether a court should award either compound or simple interest."[87] To my knowledge, this Court has yet to formulate a list of factors to consider when determining whether an award of interest should be simple or compound. To be frank, I am not sure what factors might appear on such a list. Factors affecting the fair value of petitioners' shares are best addressed in the determination of the fair value. Factors affecting the ability of the Court to provide full compensation to the petitioners for the loss of the use of their funds and to ensure that the corporation does not receive unjust benefit from the use of petitioners' funds may be addressed while setting the interest rate. The extent to which one party may be relatively more responsible for a delay in the proceedings may be addressed by balancing the two rates to relieve some of the burden imposed by the other party. Regardless of the amount of value established as the fair value, the magnitude of the particular rate which best serves the compensatory and restitutionary purposes, or the extent to which one party may have delayed the proceeding, it appears to me that, in this case, only an award of compound interest may truly serve to compensate the petitioners for the loss of the use of their funds and to prevent the corporation from retaining

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[86] *See Cede & Co.*, Del. Ch., C.A. 7129 (Oct. 19, 1990) (no discussion); *Id.* Dkt. 55 (Restated Modified Order and Final Judgment) (no discussion).

[87] *Rapid-American Corp.*, 603 A.2d at 808.

unjust benefits from the use of petitioners' funds.[88] As Becklean explained, compound interest is "the standard form of interest in the financial market."[89] Neither Becklean nor Dages could provide an example of an investment that would not provide for compound interest.[90] Certainly respondent has earned compound interest on its investments during the pendency of this proceeding and certainly petitioners would have had to pay compound interest to borrow funds during the pendency of the proceeding. Accordingly, I am unable to conclude that an award of simple interest will adequately compensate the petitioners for the loss of the use of their funds or prevent the corporation from retaining unjust benefits from the use of petitioners' funds.[91]

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[88] *See Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2nd Cir.1993) (holding that district court's failure to award compound interest was an abuse of discretion because compound interest was necessary to make plaintiff whole); *In re Valuation of Common Stock of McLoon Oil Co.*, Me., 565 A.2d 997 (1989) (referee's failure to award compound interest on fair value of appraised shares reversed as legal error because compounding interest was "the only fair and equitable way to compensate the Dissenters for the lost use of their funds").

[89] Tr. 111.

[90] *Id.*; *Id.* at 389.

[91] *See Bogosian v. Woloohojian Realty Corp.*, 1997 WL 431885 (D.R.I.) (finding that the case presented "a situation in which it might fairly be said that failing to award compound interest would not fully compensate the plaintiff, and would therefore amount to an abuse of th[e] court's discretion."); *In re Valuation of Common Stock of McLoon Oil Co.*, Me., 565 A.2d at 1007 (noting that because compound interest is available to the dissenting shareholders, it may be more profitable for shareholders to invest the consideration initially offered rather than to invoke the lengthy appraisal process).

C. *Compounding Interval*

Petitioners have requested that interest be compounded monthly. The selection of the appropriate compounding interval, like the determination of the proper interest rate and the decision to award simple or compound interest, should be guided by the dual purposes of providing compensation to the dissenting shareholder and compelling the corporation to disgorge any unjustly retained benefit from the use of petitioners' funds. The compounding interval should, thus, reflect the interval available to the petitioners had they the use of their funds as well as, if possible, the interval actually received by the corporation. Neither side has provided evidence of such intervals. I find that the dual purposes of compensation and restitution may only be served by a compounding interval at least as frequent as one month.[92] Petitioners, therefore, are entitled to the legal rate of interest, compounded monthly, on the fair value of their shares ($8.50 per share) from July 1, 1991, to the date of payment.

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[92] *Marfia v. T.C. Ziraat Bankasi*, 968 F.Supp. 152, 153 (S.D.N.Y.1997) (monthly compounding); *Andrew Corp. v. Gabriel Electronics, Inc.*, 785 F.Supp. 1041, 1055 (D.Me.1992) (monthly compounding); *New Orleans Elec. Pension Fund v. Newman*, 784 F.Supp. 1233, 1238 (E.D.La.1992) (monthly compounding); *T.A. Pelsue Co. v. Grand Enterprises, Inc.*, 782 F.Supp. 1476, 1502 (D.Colo.1991) (monthly compounding). *But see also Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 721 F.Supp. 28, 29 (E.D.N.Y.1989) ("Daily compounding more accurately reflects modern banking and investment practices, and thereby satisfies more fully" the goal of proving full compensation for patent infringement."); *Trans-World Mfg. Corp. v. Al Nyman & Sons*, 633 F.Supp. 1047, 1057 (D.Del.1986) (Daily compounding serves goal of providing "adequate compensation" for plaintiff who had been deprived of interest that could have been earned had plaintiff received payment promptly.).

I ask counsel to confer and to agree upon a form of Order implementing this decision.

APPENDIX C

CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENTS

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENTS

AMENDMENT 14 § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

APPENDIX E

WEST'S DELAWARE CODE
TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATIONLAW
SUBCHAPTER IX. MERGER OR CONSOLIDATION

Current through the End of the 1997 Regular Session

§ 251. Merger or consolidation of domestic corporations

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) in the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation; (4) in the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement; (5) the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation and, if any

shares of any of the constituent corporations are not to be converted solely into shares or other securities of the surviving or resulting corporation, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (6) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with § 155 of this title. The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at the holder's address as it appears on the

records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the directors shall deem advisable. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with § 103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this section;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving corporation, stating the address thereof; and

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with § 103 of this title. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent

corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with § 103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be

issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent corporations to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and each of the constituent corporations to the merger are corporations of this State; (4) the certificate of incorporation and by-laws of the holding company immediately following the effective time of the merger contain provisions identical to the certificate of incorporation and by-laws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification or cancellation of stock, if such change, exchange, reclassification or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor corporation becomes or remains a direct or

indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the certificate of incorporation of the surviving corporation immediately following the effective time of the merger is identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification or cancellation of stock, if such change, exchange, reclassification or cancellation has become effective); provided, however, that (i) the certificate of incorporation of the surviving corporation shall be amended in the merger to contain a provision requiring that any act or transaction by or involving the surviving corporation that requires for its adoption under this chapter or its certificate of incorporation the approval of the stockholders of the surviving corporation shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the certificate of incorporation of the surviving corporation, and (ii) the certificate of incorporation of the surviving corporation may be amended in the merger to reduce the number of classes and shares of capital stock that the surviving corporation is authorized to issue; and (8) the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as

determined by the board of directors of the constituent corporation.

As used in this subsection only, the term "holding company" means a corporation which, from its incorporation until consummation of a merger governed by this subsection, was at all times a direct or indirect wholly-owned subsidiary of the constituent corporation and whose capital stock is issued in such merger. From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection: (i) to the extent the restrictions of § 203 of this title applied to the constituent corporation and its stockholders at the effective time of the merger, such restrictions shall apply to the holding company and its stockholders immediately after the effective time of the merger as though it were the constituent corporation, and all shares of stock of the holding company acquired in the merger shall for purposes of § 203 of this title be deemed to have been acquired at the time that the shares of stock of the constituent corporation converted in the merger were acquired, and provided further that any stockholder who immediately prior to the effective time of the merger was not an interested stockholder within the meaning of § 203 of this title shall not solely by reason of the merger become an interested stockholder of the holding company, and (ii) if the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously

represented shares of capital stock of the constituent corporation. If an agreement of merger is adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection, the secretary or assistant secretary of the constituent corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in the first sentence of this subsection have been satisfied. The agreement so adopted and certified shall then be filed and become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

APPENDIX F

WEST'S DELAWARE CODE
TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER IX. MERGER OR CONSOLIDATION

Current through the End of the 1997 Regular Session

§ 262. Appraisal rights

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a

merger or consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title, § 252, § 254, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as

a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of his shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or

resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or § 253 of this title, each constituent corporation, either before the effective date of the merger or consolidation or within ten days thereafter, shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section; provided that, if the notice is given on or after the effective date of the merger or consolidation, such notice shall be given by the surviving or resulting corporation to all such holders of any class or series of stock of a constituent corporation that are entitled to appraisal rights. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within twenty days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity

of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business

on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw his demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after his written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list

containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or

consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted his certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that he is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded his appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

Supreme Court, U.S.
FILED
JUL 24 1998
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No. 98-7

In The

Supreme Court of the United States

October Term, 1997

CHARLES L. GRIMES,

Petitioner,

v.

VITALINK COMMUNICATIONS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully restates Petitioner's "Questions Presented" as follows:

> When a former corporate shareholder is compensated for his shares in a corporation, which was incorporated, operated, and regulated pursuant to state law, does compensation pursuant to that same statutory scheme, which pre-existed the former shareholder's acquisition of shares, constitute a taking under the Fifth and Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the case caption, the Gadfly Foundation was a co-petitioner (along with Charles Grimes, the Petitioner herein) in the case before the Supreme Court of Delaware.

Vitalink Communications Corporation was wholly acquired by Network Systems Corporation, and, subsequently, Network Systems Corporation was wholly acquired by Storage Technology Corporation. Thus, Storage Technology Corporation is the successor in interest to Vitalink Communications Corporation.

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STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement of the Case, with the following exceptions:

1. As more fully explained *infra*, Respondent disagrees with Petitioner's characterization of Respondent's actions under Delaware law in merging Vitalink Communications Corporation ("Vitalink") into Network Systems Corporation ("NSC") as effecting a "taking" as the term is used in the Fifth and Fourteenth Amendments. (*See* Petition For A Writ of Certiorari ("Pet. Br.") at 2 (characterizing the July 1, 1991 merger as the "time of taking").)

2. The "discount rate" used by the experts in valuing Vitalink based on future cash flows reflects, among other factors, the relative risk inherent in Vitalink's achievement of those future cash flows. Because Vitalink was a relatively high risk company, its future cash flows were discounted by a relatively high rate in order to arrive at Vitalink's current (as of July 1, 1991) value. There was no logical basis for the Delaware courts to, in effect, guarantee Petitioner a high rate of return simply because he chose to make a high risk investment. (*See* Pet. Br. at 2-3 (characterizing the discount rate as reflective of Vitalink's earning power).)

3. The Delaware Court of Chancery rejected Petitioner's argument because it recognized that Petitioner had failed to provide any logical explanation of why the discount rate reflected Petitioner's lost use of his funds. (Pet. Br., Appendix B at 29a (Court of Chancery Opinion); *see* Pet. Br. at 3 (asserting that the Court of Chancery provided no reason for rejecting Petitioner's theory).)

REASONS FOR DENYING THE WRIT

This Court should deny Petitioner's writ because, under the Court's well settled takings jurisprudence, nothing was taken from Petitioner such as to invoke the just compensation requirement of the Fifth and Fourteenth Amendments. Petitioner's property rights (i.e. his shares in Vitalink) were created under and regulated by Delaware corporations law, and nothing was "taken" from Petitioner when his shares were acquired and paid for by NSC pursuant to that same Delaware law. Petitioner has presented no questions worthy of this Court's attention under Rule 10, and Petitioner's request should be denied.

A. Under Delaware Law, Petitioner Has No Property Right To Any Interest At All – Much Less Any Particular Interest Rate.

Vitalink incorporated and issued shares of stock under Delaware law. *See generally* 8 Del. Code §§ 101-619 (Delaware General Corporation Law). NSC acquired Petitioner's shares in Vitalink pursuant to Delaware law, *see* 8 Del. C. § 251, and Petitioner brought his action seeking appraisal of his shares of stock in Vitalink under Delaware law, *see* 8 Del. C. § 262. When Petitioner acquired his subject property rights, these rights arose out of and were already subject to Delaware General Corporations Law. Shares of stock in Vitalink[1] were wholly a creature of

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[1] Vitalink issued the public stock in question in the 1980's, long after the establishment of forced mergers and appraisal actions under Delaware law.

statute and their ownership was fully subject to regulation by statute.

Fifty years ago, the Delaware Supreme Court affirmed a decision of the Delaware Court of Chancery rejecting the very same argument put forth by Petitioner today. *Meade v. Pacific Gamble Robinson Co.*, 51 A.2d 313, 318 (Del. Ch. 1947), *aff'd*, 58 A.2d 415 (Del. 1948). The Delaware courts held that a petitioner seeking stock appraisal rights under Delaware law had no right to interest at all – much less a right to any particular rate of interest. *Id.* Today, the appraisal statute specifically provides that the Court of Chancery may, in its sole and absolute discretion, award a fair rate of interest, if it so chooses. 8 Del. C. § 262(h); *Rapid-American Corp. v. Harris*, 603 A.2d 796, 808 (Del. 1992).

Petitioner argues that the Fifth and Fourteenth Amendment entitle him to a specific rate of interest in a Delaware appraisal action, despite the well settled Delaware law to the contrary. In effect, Petitioner is arguing that the appraisal provision of the Delaware Code is facially violative of the Fifth and Fourteenth Amendments, and the state of Delaware has no right to define the attributes of stock ownership under its corporations law.[2] Petitioner argues that the statutory rate of interest fails to provide just compensation; however, Petitioner

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[2] If in fact Petitioner has called into question the constitutionality of Delaware's appraisal statute, then Petitioner is required to comply with Rule 29.4(c) and provide notice to the state of Delaware. There is no indication in Petitioner's brief that he has so complied.

has no Constitutional right to any compensation whatsoever because there has been no taking under the Fifth and Fourteenth Amendments.

B. The Acquisition of and Payment for Petitioner's Shares in Vitalink Pursuant to Delaware Corporations Law Was a Valid Exercise of the Police Powers of the State of Delaware and Was Not, Therefore, a Compensable Taking under the Fifth and Fourteenth Amendments.

Not every deprivation of property is compensable as a taking under the Fifth and Fourteenth Amendments. A state may exercise its police power to regulate its commerce and industry for the general wealth and prosperity of its people without invoking the takings clause of the Fifth and Fourteenth Amendments. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-23 (1992); *Mugler v. Kansas*, 123 U.S. 623, 658, 663 (1887). Property rights arising under state law are held subject to regulation and limitation pursuant to the state's police power. *Lucas*, 505 U.S. at 1027; *Mugler*, 123 U.S. at 665. In the case of personal property (e.g. shares in Vitalink), the state traditionally exercises a "high degree of control over commercial dealings" of which an owner of such property ought to be aware. *Lucas*, 505 U.S. at 1027-28. These regulations pursuant to the state's police power shape the content of the "bundle of rights" held by the property owner. *Id.* at 1027.

The state of Delaware has enacted a comprehensive General Corporation Law covering, *inter alia*, formation, stock issuance, governance, and mergers, including rights of dissenting shareholders to compensation pursuant to

statutory appraisal. *See generally* 8 Del. C. §§ 101-619. Petitioner's shares in Vitalink were held by Petitioner subject to Delaware's General Corporation law, and the acquisition of and payment for those shares pursuant to the valid exercise of the police powers of the state of Delaware did not effect a compensable taking under the Fifth and Fourteenth Amendments.

Petitioner acknowledges that his rights as a shareholder arise from and are subject to the General Corporation Law of Delaware. (Pet. Br. at 8.) However, Petitioner argues that a "squeeze out" of a minority shareholder is nevertheless a taking subject to the just compensation requirements of the Fifth and Fourteenth Amendments. (Id.) In support of this proposition, and in contradiction to this Court's long standing takings jurisprudence, Petitioner cites two cases: *Beerly v. Department of the Treasury*, 768 F.2d 942, 948 (7th Cir.), *cert. denied*, 475 U.S. 1010 (1985) and *Offield v. New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906).

In *Beerly*, the Seventh Circuit addressed due process issues, 768 F.2d at 947 – not present in the instant case – and the court specifically declined to address the question of just compensation, *id.* at 949. In addition, *Beerly* involved the "squeeze out" of a shareholder pursuant to federal – not state – law. *Id.* at 944. Thus, *Beerly* does not stand for the proposition that the "squeeze out" of a corporate shareholder pursuant to state law effects a compensable taking. To the extent that the logic of *Beerly* may be extended to a "squeeze out" pursuant to state law, it is simply inconsistent with this Court's takings jurisprudence.

In *Offield*, this Court held that a takings claim based on the forced acquisition of shares of railroad stock pursuant to a particular state law was not frivolous and, therefore, upheld the state high court's decision to deny a demurrer. 203 U.S. 375-77. The case provided absolutely no analysis of or reference to this Court's line of cases holding that valid exercises of a state's police powers do not constitute a compensable taking.

C. The Application of Delaware Law to Petitioner's Shares in Vitalink was Just and Fair and Does Not, Therefore, Constitute a Compensable Taking.

More recently, this Court's takings cases have focused on the "justice and fairness" of any governmental deprivation and have relied on a three factor analysis in determining whether to invoke the just compensation requirements of the Fifth and Fourteenth Amendments: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment backed expectations; and (3) the character of the governmental action. *Eastern Enterprises v. Apfel*, 1998 U.S. Lexis 4213, *45-46, 51 (June 25, 1998). Each of these factors undermines Petitioner's attempts to characterize the Delaware General Corporation Law as effecting a taking in this case.

1. The Economic Impact of the Regulation on Petitioner Has Been Minimal.

Petitioner has in fact been compensated for his shares of stock in Vitalink. He received fair value for his shares pursuant to an appraisal action to value the shares before

the Delaware Chancery Court, and he received interest on that value at the statutory rate, compounded monthly, from the time of the merger until the time he received payment. Petitioner's sole claim is that the statutory interest rate[3] was inadequate. In *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923) – the case upon which Petitioner relies to establish his right to interest in the event of a compensable taking – this Court stated that the payment of interest at the statutory rate was "palpably fair and reasonable" as just compensation. *Id.* at 306. Thus, any economic impact on Petitioner as a result of the loss of and statutory compensation for his shares has been minimal.

2. A Shareholder in a Delaware Corporation Cannot Reasonably Expect to Avoid the Application of Delaware General Corporation Law to His or Her Shares.

When a party acquires a property right subject to regulation, the imposition of such regulation on the subject property right does not constitute a taking because it cannot be said to interfere with the party's investment backed expectations. *Eastern Enterprises*, 1998 U.S. Lexis 4213, *53-54; *Lucas*, 505 U.S. at 1016 (majority opinion), 1034 (Kennedy, J., concurring).

The right of a corporation to force a merger on dissenting minority shareholders under certain conditions pursuant to statute is well established under Delaware

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[3] Under Delaware law, this was the Federal Reserve Discount rate plus four percentage points.

law, as are the appraisal rights of such a dissenting shareholder. Petitioner bought his stock subject to the Delaware General Corporation Law and cannot now claim that his loss of and payment for those shares pursuant to Delaware law has interfered with his reasonable investment backed expectations.

3. The Regulation Under Which Petitioner Lost His Shares and Received Compensation is Uniformly Applied to Dissenting Shareholders Who Lose Their Shares in Delaware Corporations.

Restrictions that are reasonably related to implementation of a policy for the general public welfare are less likely to effect a taking to the extent that they are widely applicable to all similarly situated property. *Lucas,* 505 U.S. at 1023. The Delaware General Corporations Law is uniformly applicable to all Delaware corporations and their shareholders. Its application to Petitioner consistent therewith does not effect a compensable taking under the Fifth and Fourteenth Amendments.

CONCLUSION

Petitioner has been fully and fairly compensated for his shares in Vitalink pursuant to settled Delaware corporations law, and such events do not give rise to a takings claim under the Fifth and Fourteenth Amendments to the United States Constitution. This Court's takings jurisprudence is clear and consistent on this issue, and

Petitioner's request for a writ of *certiorari* should be denied.

Dated: July 24, 1998.

Respectfully submitted,

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No. 98-7

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHARLES L. GRIMES,

Petitioner,

v.

VITALINK COMMUNICATIONS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

REPLY BRIEF FOR PETITIONER

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July 31, 1998

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REPLY BRIEF FOR PETITIONER

Respondent's opposition to the petition for certiorari simply points up the split between the Seventh Circuit, which held in *Beerly* v. *Dept. of the Treasury*, 768 F.2d 942 (7th Cir.), *cert. denied*, 475 U.S. 1010 (1985), that a "squeezeout" under corporation law is subject to due process, and the Supreme Court of Delaware, which in this case has held in effect that it is not. That *Beerly* dealt with a federal corporation law, the National Bank Act, whereas this case deals with a state corporation law, is a distinction without a difference. Obviously the Delaware courts are subject to the requirements of due process under the Fourteenth Amendment.

It is clearly desirable that this Court resolve this split of authority between a major circuit court of appeals on the one hand, and the courts of the state under whose law a large proportion of publicly held companies are incorporated on the other hand; and in so doing, clarify the applicable requirements of "just compensation" under the due process clause of the Fourteenth Amendment. This is particularly true now, when every day's newspaper brings news of another merger of two major corporations.

The petition for certiorari should be granted.

Respectfully submitted,

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